

We will first address the threshold question raised by claimant as to whether the Appeals Board has jurisdiction to consider this appeal. Claimant alleges that respondent's

application for review was filed more than ten (10) days from the date of the original Order of April 26, 1995. K.S.A. 44-551(b)(1), as amended by S.B. 59 (1995), provides in pertinent part, as follows:

"All acts, findings, awards, decisions, rulings or modifications of findings or awards made by an administrative law judge, shall be subject to review by the *board* upon written request of any interested party within 10 days and if no such request is made, then the *board* shall approve such actions, findings, awards, decisions, rulings or modifications of findings or awards of the administrative law judge."

Claimant argues that an appeal must be filed within the time prescribed for the original judgment and that the ten (10) day period in which an appeal must be filed is not extended by a nunc pro tunc order. Furthermore, claimant submits that since a nunc pro tunc order relates back to the original date of the order it seeks to rectify, that the order nunc pro tunc should have no effect in extending the statute of limitations.

It should be noted that the Nunc Pro Tunc Order of May 3, 1995 was identical in all respects to the original Order of April 26, 1995, except to correct a clerical error concerning the rate for payment of temporary total disability compensation. The Nunc Pro Tunc Order did not alter or amend any of the court's underlying findings with respect to the compensability of the claim, nor did it seek to change the benefits ordered paid at the expense of the respondent and its insurance carrier.

The Appeals Board has previously addressed the question of whether an Administrative Law Judge has the authority to correct clerical errors in its orders by nunc pro tunc. In its decision in the case of Simmons v. Sim Park Golf Course, Docket No. 186,888 (opinion filed July 31, 1995) the Appeals Board held that an Administrative Law Judge does have such authority. See also Boyd v. Yellow Freight Systems, Inc., 214 Kan. 797, 522 P.2d 395 (1974). However, we do not reach the issue of whether a nunc pro tunc order extends the time for the filing of an appeal as to the underlying issues settled in the original order herein because the record shows that respondent did timely file its Application for Review within the time prescribed, even counting from the date of the original April 26, 1995 Order.

Our review of the file maintained by the Kansas Division of Workers Compensation reveals that although respondent's Application for Board Review and Docketing Statement was not received in the Topeka, Kansas office until May 9, 1995, it was filed in the Division's Overland Park, Kansas office on Monday, May 8, 1995.

Director's Rule 51-18-2 provides:

"Review by director. The effective date of the administrative law judges' acts, findings, awards, decisions, rulings, or modifications, for review purposes, shall be the day following the date noted thereon by the administrative law judge.

"Application for review shall only be considered as timely filed if received in the central office or one of the district offices of the Director on or before the tenth day after the effective date of the act of an administrative law judge. (Authorized by K.S.A. 44-573;

implementing K.S.A. 44-525, 44-551; effective Jan. 1, 1966; amended Jan. 1, 1969; amended Jan. 1, 1973; amended May 1, 1983.)"

Also dealing with the computation of time is Director's Rule 51-17-1 which provides:

"Saturdays, Sundays and holidays excluded. The time within which an act is to be done shall be computed by excluding the first day and including the last; if the last day be a Saturday or Sunday or a statutory holiday, it is to be excluded. (Authorized by K.S.A. 60-206, K.S.A. 1972 Supp. 44-573; effective Jan. 1, 1966; amended Jan. 1, 1973.)"

Therefore, the appeal was timely filed even counting from the date of the original April 26, 1995 Order. The Appeals Board finds claimant's allegation that respondent's appeal is untimely when measured from the date of the original April 26, 1995 Order to be without merit.

We next direct our attention to the issue raised by respondent of whether the condition for which temporary total disability compensation and medical benefits were awarded was the result of a personal injury by accident arising out of and in the course of the claimant's employment with respondent.

Claimant sustained personal injury by accident on September 4, 1992 when he was struck from behind by a fork lift at work. Respondent does not dispute that claimant sustained injuries to his low back and right lower extremity. Respondent authorized medical treatment for those injuries, which was provided. Respondent disputes claimant's allegation of injury to his left ankle and points out that claimant was never treated for a left ankle injury and that the medical records make no mention of left ankle complaints.

Claimant contends that the initial injury was to his back, both legs, both ankles and feet. He maintains that he did complain to the treating physicians of left ankle pain but never received treatment. On September 28, 1994 he was walking in his apartment when his ankle went out, causing him to fall to the floor in pain. He testifies that the ankle had gone out on him previously but never this bad. His ankle has gotten steadily worse. He is currently wearing an ankle brace and using a crutch when he walks.

The Appeals Board finds from the claimant's testimony, the nature and circumstances of the accident, and the medical evidence, including the pain diagram claimant completed for the doctor (Exhibit No. 1 to the Preliminary Hearing Transcript) on January 4, 1993 marking the left ankle, that claimant has sustained his burden of proving a work-related injury to his left ankle. The finding by the Administrative Law Judge to this effect should be affirmed.

The final issue raised by respondent deals with whether the claimant is entitled to additional vocational rehabilitation benefits and temporary total disability compensation when he has voluntarily resigned from substantial, gainful employment earning a comparable wage. The Appeals Board finds that it is without jurisdiction to review this issue on an appeal from a preliminary hearing order.

The Appeals Board has the authority under K.S.A. 44-551, as amended, to review decisions of an Administrative Law Judge where it is alleged that the Administrative Law

Judge exceeded his or her jurisdiction in granting or denying the relief requested. In this instance, the Administrative Law Judge entered an order of vocational rehabilitation and temporary total disability benefits following a preliminary hearing pursuant to K.S.A. 44-534a which the Administrative Law Judge has the authority to do. K.S.A. 44-534a also defines four issues which, if disputed, are deemed jurisdictional and subject to review by the Appeals Board on an appeal from a preliminary hearing order. They are: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice is given or claim timely made; and (4) whether certain defenses apply. The issues raised by respondent concerning vocational rehabilitation and temporary total disability compensation are not jurisdictional issues and, thus, are not subject to review by the Appeals Board at this juncture of the proceedings.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the April 26, 1995 Preliminary Hearing Order and the May 3, 1995 Nunc Pro Tunc Order by Administrative Law Judge Floyd V. Palmer should be, and hereby are, affirmed and remain in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of September 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert E. Tilton, Topeka, KS
Daniel P. Hanson, Overland Park, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director